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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EDDIE LEE ROWE, SR.,
Petitioner,

v.

WALGREEN COMPANY and
TONY FRIZZELL,
Respondents

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITIONFOR WRIT OF CERTIORARI

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291P

Question Presented

1. Whether the trial court and Fifth Circuit so departed from accepted and usual course of judicial proceedings by adopting a presumption that ". . .it defies logic that a national retailer would go to lengths and employ the subterfuge alleged by Rowe to demote or constructively discharge its only black store manager in the entire Houston division ...." that these decisions call for this Court's intervention.

2. Whether a judge may take facts and inferences in the light most favorable to the movant in granting a summary judgment.

3. Whether the judge may disregard evidence supporting the non-movant and accept as true the movant's facts and inferences in granting a motion for summary judgment.

4. Whether the judge may disregard evidence of the non-movant which directly contradicts evidence provided by the movant in granting a motion for summary judgment.

Names of All the Parties

The names of all the parties appear in the caption.

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Basis for Jurisdiction

1. The judgment sought to be reviewed hereby was entered on February 27, 1997.

2. An order denying a petition for rehearing was entered on March 28, 1997.

3. If this Court grants petitioner's writ, jurisdiction will be proper under 28 U.S.C. § 1254.

Constitutional Provisions and Statutes Involved

4. Civil Rights Act of 1964, 42 U.S.C. §§2000 et. seq.

5. Federal Rule of Civil Procedure 56

Statement of the Case

Eddie Rowe, Petitioner, is an African American who had 17 years of loyal service with the defendant corporation. This case is based on the wrongful termination of Eddie Rowe for race discrimination. Federal jurisdiction in the Southern District of Texas was based on 28 U.S.C. § 1331. The district court granted summary judgment and the 5th Circuit affirmed after a *de novo* review. The Fifth Circuit expressly incorporated by reference the district court's opinion into its own, therefore both are included in the appendix.

After service in the U.S. Army and upon graduation from college in 1978, Rowe moved to Houston and obtained his first permanent job with Sage Drug Stores as an assistant manager in 1978. (R. at 988). From 1978 until 1981, Rowe worked as an assistant manager for Sage. (R. at 988). After Walgreens acquired Sage Drug Stores in 1981, Rowe was promoted to manager in November, 1981, and he remained in that position until September 1, 1982, when he was reassignment for training in the Walgreen system. He remained as a trainee in the Walgreen system from September, 1982, until March, 1985. (R. at 988, 955). In March,

1985, he was promoted to store manager and managed the store until it was closed in July, 1986. (R. at 988). While another store was being obtained for him, he held the position of executive assistant, substituting for managers in his district during July, August and September, 1986. (R. at 988, 853). In September, 1986, Rowe was again assigned as manager of a Walgreen store. (R. at 988-87).

In March, 1992, Rowe was transferred to manage a new Walgreen store on Crosstimbers in Houston, Texas. (R. at 987). Rowe set a new opening day sales record for the city of Houston as well as a new sales record during the four days of grand opening activities. (R. at 987, 939). The store was profitable from its inception and was considered a "high volume" store by Walgreens' criteria. (R. at 987). Rowe's excellent profit performance was noted in August 1993 when he was commended (R. at 987, 942-40) and his store was rated "above standard" (R. at 987, 937). Rowe's store was in the top 25% in profit performance for his district. (R. at 987, 719).

On October 4, 1993 Mr. Witt, the district manager at the time, and Mr. McMillan, a regional manager, visited Mr. Rowe's store. (R. at 986). While they were very complementary, they found certain items that needed attention. (R. at 986, 960). This was neither unusual nor out of the ordinary. (R. at 986, 960). Mr. McMillan made a notation that several items needed to be completed within two weeks. (R. at 933).

Rowe remedied each specific problem and nothing else was ever said about it. (R. at 986). In November 1993, Mr. Frizzell hit the scene as the new district manager. Immediately Walgreen's evaluation of Rowe's performance went from "standard," as it had been his entire career, to "below standard." (R. at 986). Rowe was subjected to constant carping, criticism, nitpicking, badgering and harassment from Frizzell. (R. at 986, 959).

Frizzell Hits The Scene

At the time Mr. Frizzell became the district manager or shortly thereafter, Eddie Rowe was the only black store manager in his district. (R. at 985, 1073).

Frizzell visited Rowe's store on November 9, 1993, December 6, 1993, February 8, 1994, and March 21, 1994. Frizzell made supervision notes during each visit, detailing "problems." After his final visit, Frizzell concluded that Rowe had thirty days to correct these "deficiencies" and maintain expected standards or be removed from his position as store manager. (R. at 918). Frizzell subsequently decided to remove Rowe from his manager's position, making Houston a city with no black managers. In an internal memorandum dated June 6, 1994, Frizzell states that Rowe was being demoted because he was not fulfilling his obligations as store manager. (R. at 864). Specifically, the reasons listed were Rowe did not follow through with audit procedures, the store condition, internal controls, and outs (items missing from shelves). (R. at 864). Frizzell admitted in his deposition that of the 146 combined entries in his supervision visit notes, only three addressed the problem of "outs," and that the supervision notes that he had prepared did not bear out the claim that there were too many "outs." (R. at 984, 622). Frizzell also admitted that of the 146 entries in his supervision notes, only four addressed cleanliness. (R. at 622). An inter-company memo dated August 4, 1993, from the Loss Prevention Administration found that Rowe's store had above standard compliance with cash controls and excellent compliance with merchandise and payroll controls. (R. at 937).

After Rowe was demoted, he was told by Frizzell that he would be assigned to a 24 hour store that was over 25 miles from his house and placed on a rotating shift. (R. at 958). Rowe was never given further training in this position, and was in fact ordered to train younger executive assistants who were a paygrade above Rowe's new trainee status. (R. at 958). Rowe was informed that he would never be a Walgreen manager again. (R. at 958). Rowe was replaced by a white manager.

Rowe's Mother Suffers a Fatal Stroke on the Very Day He Was Denied Leave To Take Her To the Doctor

Eddie Rowe's sister died in January, 1993, and his father died in November, 1993. (R. at 981, 959). Eddie brought his sick mother to Houston to live with him in Houston on the Friday before Mother's Day in 1994. (R. at 981, 959). On that Friday, he told Frizzell of his mother's poor physical condition, that he was bringing his mother to Houston to live with him, and he asked for the following Monday off in order that he might take his sick mother to the doctor. (R. at 981, 959, 757-56). Rowe was not allowed to have the following Monday off. (R. at 981). Mr. Frizzell told Mr. Rowe that he and Mr. McMillan "might make [visit Rowe's] store" and that he (Frizzell) wanted Rowe there. Neither Frizzell nor McMillan visited Rowe's store that day. (R. at 980, 959, 757-56). Eddie Rowe told his supervisor that his mother was sick, and she needed to go to the doctor. (R. at 980, 959, 757-56). The day Rowe was to take his mother to see the doctor, she suffered a fatal stroke. (R. at 980, 959, 757-56).

In August, 1994, Rowe filed a complaint with the EEOC. (R. at 958). Only after the EEOC complaint was Rowe given an opportunity to work at the Sugarland store close to his home at an assistant manager position. (R. at 958). Rowe could no longer take it, and finally resigned because of the obvious racism and the fact that he would never be a manager again. (R. at 834).

White Managers Were Treated Differently

McMillan testified that generally the first time a manager receives a "below standard" rating in their evaluation, the manager is transferred to a lower volume store. (R. at 705-04) Rowe was the only black manager of 22 stores in Frizzell's district. (R. 637; Frizzell depo p. 44). At the same time Rowe received a "below standard" rating on a score of 66, Mr. Goodman, a white manager, received an identical "below standard" score of 66 in February, 1994. Rather than receiving a demotion, Frizzell transferred Mr. Goodman to a lower volume store as a store manager. (R. at 705-

04). Richard Hogan, another white manager, received a "below standard" rating at the same time Rowe recieved a "below standard" rating. Hogan received a score of "69" which was 3 points above Rowe yet still was still "below standard" of score of 70. Moreover, Rowe was sent to help Mr. Goodman in his store to help "bail him out" when he was in trouble. (R. 855 [Rowe depo p. 37, 38]). Mr. Hogan was neither demoted or transferred. (R at 271). Defendants contend that this "below standard" rating did not merit a transfer or demotion as it did for Eddie Rowe, a black man. (R. at 271).

Additionally, Doug Berry was a white manager who was transferred as a store manager to a lower volume store rather than being demoted when the had received a less favorable evaluation. Likewise, Rowe was instructed to help "bail out" Mr. Berry. (R. 855-854 [Rowe depo at p.p. 40-42]).

After over a decade of "standard" ratings, Eddie Rowe received his first "below standard" rating and was demoted to manager trainee and assigned to a store across town. At Walgreen's it was easier to survive if one were white. Indeed, there was a different "standard" for white employees than black employees.

Reasons for Allowance of the Writ

The Fifth Circuit Engaged in an Impermissible Presumption Against an Individual on Behalf of a Large Corporation That Large Corporations Do Not Lie, and Weighed the Evidence and Inferences From the Evidence in a Light Most Favorable to the Non-Movant.

The Fifth Circuit denied the last black manager of a Walgreen's in the entire city of Houston, Texas the opportunity to present his race discrimination case to a jury by turning the summary judgment standard on its head. The court disregarded Rowe's evidence, and took Walgreen's evidence as true. This Court has established longstanding rules regarding motions for summary

judgment in federal courts. The purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case demand at least one sworn averment of that fact before the lengthy process of litigation continues. *Lujan v. National Wildlife Federation*, 110 S.Ct. 3177, 3188-89 (1990). Of primary importance is the rule that facts and inferences must be taken in the light most favorable to the non-movant. *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2435 (1991). Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the disputed facts are jury functions, not those of a judge. *Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2513 (1986). Additionally, when facts specifically averred by the non-movant contradict the facts averred by the movant, the motion must be denied. *Lujan v. National Wildlife Federation*, 110 S.Ct. 3177, 3188 (1990). Only if there could be but one reasonable conclusion should summary judgment be granted. *Anderson*, 106 S.Ct. at 2511. The Fifth Circuit in this case abandoned these rules, and took as true the facts and inferences supporting the movant, disregarding those supporting Rowe. Indeed, a review of this case and the court's opinion demonstrates the court was looking at the evidence through the wrong end of the telescope. In doing so, the court has so far departed from the accepted and usual course of summary judgment standards as to call for an exercise of this Court's power of supervision. To do nothing is to perpetuate an alarming trend among some courts to ignore proper summary judgment standards in order to efficiently wash from their dockets certain classes of cases. This should be chilling not just to the affected losers of summary judgment motions, but to all lawyers and courts.

Rowe proved a *prima facie* case of race discrimination under Title 7. *McDonnell Douglas v. Green*, 411 U.F. 792, 800 (1973); see the trial court and Fifth Circuit's opinion at App. 2a and 8a. The defendant corporation advanced business justifications for Rowe's termination. Rowe offered evidence that these reasons were untrue. However, the Fifth Circuit and the trial court have placed an impossible burden for plaintiff to overcome, that

being a presumption or inference of truthfulness on the part of large corporations.

Inference or Presumption of Large Corporation's Truthfulness

Eddie Rowe was the only black Walgreen store manager in the city of Houston at the time he was fired. In affirming summary judgment after a *de novo* review, the Fifth Circuit held this created an inference that there was no discriminatory animus involved in his discharge, holding that it "defies logic" that a large corporation would go to such lengths to discriminate against its last black manager in the city of Houston. The Fifth Circuit's logic itself is naive and is much like presuming Ford Motor Company was free from religious intolerance towards Jew's during the 1920's when Henry Ford was at the helm, or that Texaco was free from racial bigotry in the early 1990's (despite the tape recordings). Logic dictates that if any inference must be drawn from the fact there is only a single black store manager in a city of several million people, the inference must be that Walgreen is taking active measures to keep blacks out of it's organization. Indeed, the law says we must draw all justifiable inferences in favor of the non-moving party. *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2435 (1991). In making this inference in support of affirming summary judgment, the court has turned the summary judgment standard on its head, taking as true inferences which support the movant, and rejecting those in favor of the non-movant. Unfortunately for Eddie Rowe and the legal system as a whole, the Fifth Circuit consistently viewed the evidence in this skewed manner.

Rowe Was Treated Differently From White Employees

Different treatment of persons of different races is of itself a violation of Title VII. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n.15(1977); *Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 902 (5th Cir. 1987). Rowe presented evidence that several white managers who received similar evaluation scores were simply transferred as managers to lower volume stores while Rowe was demoted three levels to the position

of an hourly worker and forced to train white employees who were a level above himself. Frizzell's treatment of black managers differently from white managers raises a presumption of discriminatory intent. *Barns v. Yellow Freight Systems, Inc.*, 778 F.2d 1096 (5th Cir. 1985). Walgreen presented irrelevant evidence of white employees who were not under Frizzell's supervision that had been demoted for poor evaluations. It makes no difference if other supervisors followed the rules and treated white and black managers the same. In this case the evidence demonstrated that in Frizzell's district, white managers were treated differently.

Rowe also presented evidence that when he requested additional parking space for his store, Frizzell refused. After Frizzell successfully booted Rowe out of the store and replaced him with a white manager, the additional parking space was acquired. Rowe put forth evidence sufficient to present a genuine issue of material fact. The court, however, viewed the evidence in the light most favorable to the movant, ignored or simply discounted this evidence, and granted summary judgment. The court improperly denied Rowe his right to a trial by jury through its complete abandonment of proper summary judgment standards. *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2435 (1991) (facts and inferences must be taken in the light most favorable to the non-movant); *Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2513 (1986) (credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge).

Pretext

Frizzell stated the reasons why Rowe was demoted were Rowe did not follow through with audit procedures, the store condition, internal controls, and outs. (R. at 864). Frizzell admitted in his deposition that of the 146 combined entries in his supervision visit notes, only three addressed the problem of "outs," and that the supervision notes that he had prepared did not bear out the claim that there were too many "outs." (R. at 984, 622). Frizzell also admitted that of the 146 entries in his supervision notes, only four

addressed cleanliness. (R. at 622). Additionally, Rowe presented evidence that an inter-company memo dated August 4, 1993 from the Loss Prevention Administration found that Rowe's store had above standard compliance with cash controls and excellent compliance with merchandise and payroll controls. (R. at 937). Rowe presented evidence which directly contradicted the alleged reasons why he was fired. Rowe also presented evidence that the low numerical scores given him by Frizzell did not correspond with the evaluation of individual criteria, creating an inference that there was some reason other than his performance which caused him to receive low scores. The court chose to ignore this evidence, and simply accepted the defendants' version of the facts as true.

Additionally, up until Frizzell became his supervisor, Rowe was consistently rated as qualified to manage a large unit store. The Fifth Circuit previously has held that prior positive performance reviews can be used to establish that the decision was based on racial bias, and the proffered reason was pretextual. *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181-82 (5th Cir. 1996). Despite all the evidence calling into question the validity of the purported reasons given by Frizzell for Rowe's demotion, the court viewed the evidence in the light most favorable to the movant, and simply declared Rowe's evidence as being "feckless" (ie. weak, worthless, and ineffective). This flies in the face of proper summary judgment standards, as credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2513 (1986); *See also Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2435 (1991) (court must draw all justifiable inferences in favor of the non-moving party, including questions of credibility and the weight to be accorded particular evidence).

Intentional Infliction of Emotional Distress

The elements of intentional infliction of emotional distress are: (1) intentional or reckless conduct; (2) that is extreme or outrageous; (3) that caused emotional distress; (4) that was severe in nature. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993);

Wilson v. Monarch Paper Co., 939 F.2d 1138, 1142 (5th Cir. 1991). Frizzell intentionally refused to allow Rowe the day off so he could take his sick mother to the doctor. Frizzell, in a mean-spirited manner, arbitrarily refused Rowe's request, and on the day Rowe was to take his mother to the doctor, she suffered a fatal stroke. The court granted summary judgment against Rowe's emotional distress claim, holding that there could be no emotional distress since Rowe never told Frizzell his mother was sick when he asked for the day off. This fact was absolutely and vehemently disputed by Rowe. The Fifth Circuit took as true Frizzell's statement that Rowe never told him his mother was sick, disregarded Rowe's testimony, and granted summary judgment against Rowe. Once again, the court simply ignored the proper standards for summary judgment. *Lujan v. National Wildlife Federation*, 110 S.Ct. 3177, 3188 (1990) (when facts specifically averred by the non-movant contradict the facts averred by the movant, the motion must be denied).

CONCLUSION AND PRAYER

Judges and juries both play important roles in our legal system. Sometimes, as in this case, the court simply wants to wear both hats, making determinations it feels the jury would or should make if given the opportunity. No matter how strongly a court feels the jury would decide an issue, it is not the court's place to substitute its judgment for that of a jury. In doing so, the court not only becomes judge, jury and executioner all wrapped into one, but starts down a slippery slope which inevitably must lead to injustice. For the foregoing reasons, petitioner requests his writ be granted.

Respectfully submitted,

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APPENDIX A

FILED
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U.S. COURT OF APPEALS
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20729
(Summary Calendar)

EDDIE LEE ROWE, SR.,

Plaintiff-Appellant,

versus

WALGREEN COMPANY;
TONY FRIZZELL,

Defendants-Appellee,

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-95-3739)

Before HIGGINBOTHAM, WIENER and BENAVIDES,
Circuit Judges.
PER CURIAM:*

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

In this age and race employment discrimination case, Plaintiff-Appellant Eddie Lee Rowe, Sr. appeals the "take nothing" summary judgment granted by the district court. Specifically, Rowe complains that summary judgment was improvidently granted in the face of evidence purportedly creating genuine issues of material fact regarding disparate treatment, pretext for termination, intentional infliction of emotional distress, and the status of his last supervisor as an "employer." In broad overview, Rowe asserts that the district court weighed some of the evidence and ignored some of it, implying that the totality of the summary judgment evidence submitted by all parties was sufficient to create genuine issues of material fact and thus preclude summary judgment.

Our *de novo* review of the record in this case, the arguments of counsel as professionally and clearly presented in their respective briefs, and the detailed analysis of facts and law as set forth in the district court's Opinion on Summary Judgment, convinces us that the trial court indeed "got it right." Any issues of fact created by differences in the summary judgment evidence are either not genuine or not material. To the extent that Rowe makes a prima facie case of race discrimination (none is made for age discrimination), it is soundly rebutted by a plethora of evidence of non-pretextual, valid reasons for the employment actions taken by Walgreen supervisors. And Rowe's assertions of pretext are feckless. Rowe's protestations to the contrary notwithstanding, Walgreen and its supervisory personnel obviously bent over backwards in repeated efforts to salvage Rowe as a store manager. Indeed, it defies logic that a national retailer like Walgreen would go to the lengths and employ the subterfuges alleged by Rowe to demote or constructively discharge its only black store manager in the entire Houston division, particular when that manager is also over 40 years of age.

It suffices that the totality of the summary judgment evidence does not create a genuine issue of material fact as to either race or age discrimination, constructive discharge, or intentional infliction of emotional distress. Neither does the evidence support Rowe's contention

that, legally, Defendant-Appellant Frizzell was Rowe's employer, separate and apart from Walgreen, which was their common employer.

In sum, our plenary review leads us inevitably to the same conclusions as those reached by the district court and explicated in lucid detail in its Opinion on Summary Judgment. No useful purpose would be served by a reiteration here of the reasoning and authorities contained in the district court's explanation of the basis of its grant of summary judgment, so we elect not to write separately but rather to adopt by reference the opinion of the district court.

AFFIRMED.

APPENDIX B

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MAR 28 1997
U.S. COURT OF APPEALS
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20729

EDDIE LEE ROWE, SR.,

Plaintiff-Appellant,

v.

WALGREEN COMPANY; TONY FRIZZELL,

Defendants-Appellee,

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, WIENER and BENAVIDES,
Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:
/s/illegible
United States Circuit Judge

REHG-2

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CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY
OF THE MANDATE.

APPENDIX C

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JUL 10 1996
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MICHAEL N. MILBY
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

EDDIE LEE ROWE, JR.,	§	
Plaintiff,	§	
versus	§	CIVIL ACTION
	§	H-95-3739
WALGREEN COMPANY, *et al.*,	§	
Defendants.	§	

OPINION ON SUMMARY JUDGMENT

1. *Introduction.*

A 44-year-old black man who was demoted from store manager to assistant manager complains that his employer discriminated against him because of his age and race. He consistently received poor performance evaluations. Other managers who received similar and better evaluations also were demoted. The store had legitimate nondiscriminatory reasons to demote him.

2. *Facts.*

Eddie Lee Rowed, Jr., started working for Sage Drug Stores in Houston in September 1978. Walgreen Company acquired Sage eighteen months later and kept Rowe as an assistant manager until November 1994. He was promoted to manager three times, and he was demoted to executive assistant twice. On a scale with "outstanding" and "above-standard" as the top two ratings. Rowe consistently was evaluated at "standard" and "below-standard."

In October 1993, the district manager and regional vice-president met with Rowe and discussed numerous problems at his store. Rowe failed to maintain proper inventory, clean break rooms and hallways, post required signs, rotate outdated merchandise, affix price tags, keep merchandise off the stock room floor, or require his employees to wear name badges and proper uniforms. Rowe's lack of control over employee purchases and his failure to keep store shelves stocked contributed to profit reductions, and management-employee communication was inconsistent.

Rowe was told to improve his store within two weeks. Walgreen dropped the two-week notice when Joseph A. (Tony) Frizzell transferred from Miami to Houston as the new district manager because it wanted to give Rowe a chance to improve under a new supervisor. Frizzell evaluated Rowe in February 1994 and rated him "below standard". In March 1994 Frizzell evaluated Rowe again and noted continuing problems.

Frizzell warned Rowe that if he did not improve to expected standards within thirty days, he would be removed from his position as store manager. When Rowe did not improve, Walgreen demoted him instead of firing him to give him another chance to retrain and to earn another promotion. The regional vice-president advised him to view the demotion positively and told him that there was no reason he could not be re-promoted. On November 5, 1994, Rowe resigned as assistant manager. When he left, Rowe did not mention race, age, or intolerable working conditions.

Rowe is now 46 years old. He complains that he was constructively discharged and that Walgreen and Frizzell discriminated against him because of his age and race.

3. *Rowe's Claims.*

A. *Discrimination.*

Rowe claims that Walgreen discriminated against him because of his age and race. He asserts that he was "run off" for pretextual reasons. To establish discrimination, Rowe must show that (1) he was

a member of a protected group, (2) he was qualified for the job, (3) he suffered adverse employment action, and (4) his position was filled by someone who was not a member of a protected group or he was treated differently than people outside his protected class. 29 U.S.C. § 621 (1990); 42 U.S.C. § 1981 (1986); 42 U.S.C. § 2000 (1989); *Valdez v. San Antonio Chamber of Commerce*, 974 F.2d 592 (5th Cir. 1992). Rowe fails to make a case of discrimination.

Rowe is black, and he was forty-four years old when he was fired. Because he had received negative evaluations three times between October 1993 and March 1994, however, he was not qualified for the position of store manager. Walgreen employees must be able to communicate employees' tasks and ensure that the tasks are completed, and they must carefully maintain inventory to avoid wasting or running out of merchandise. Rowe was counseled about his poor management-employee communication, his maintaining proper inventory, and his messy store. He was told to improve these deficiencies promptly, but he failed to resolve the problems.

Rowe complains that Walgreen discriminated against him because it demoted him to assistant manager while it simply transferred white managers to lower-volume stores. Rowe was the only black Walgreen manager in Houston. The managers who were transferred to smaller stores had improved their performances to the level of being qualified to be store managers after receiving poor performance evaluations. Rowe was demoted rather than transferred to a lower-volume store because of his low performance level. He was not qualified to manage and train employees even at a low-volume store, and Walgreen concluded that his performance problems required retraining. At least nine other store managers who received equal or better evaluations than Rowe between 1991 and 1993 were also demoted. Rowe does not account for Walgreen's racial hostility in his earlier promotions. Another manager whose performance did not improve was fired. Rowe was not fired; he chose to resign.

Rowe's claims fail. Walgreen had legitimate non-discriminatory reasons for demoting him. Walgreen demoted Rowe because of

poor performance. He failed to improve his performance after being warned about deficiencies in specific areas. Walgreen did not fire him or bar him from being re-promoted; it only demoted him to enable him to receive additional training under a highly-rated store manager.

Rowe alleges no facts to support his claim of age discrimination.

B. *Constructive Discharge.*

Constructive discharge requires conditions so intolerable that a reasonable employee would feel compelled to resign. More important, the conditions must be based on racial hostility. *Jurgens v. EEOC*, 903 F.2d 386, 390 (5th Cir. 1990). Rose has not alleged intolerable conditions at Walgreen. He left despite indications from upper-level management that he would be re-promoted after training and improvement. He now complains that beginning in November 1993 he was continually harassed. He blames Frizzell for his below-standard performance reviews, and he accuses Frizzell of badgering him. Of course, Rowe got bad evaluations long before Frizzell became his supervisor. Rowe complains vaguely about conduct that is common to every workplace.

Rowe said he resigned because he could not live on an assistant manager's salary, yet he took another job that paid less. Rowe made $12 an hour as an assistant manager for Walgreen. He did not apply to be a store manager for another pharmacy chain or drug store. The month he left Walgreen, Rowe became a substitute teacher for $60 per day in the Fort Bend Independent School District.

Rowe complains of intolerable conditions at work, and he says that he was treated discriminatorily because he was black - yet he was given opportunities not offered to others who received similar evaluations. Other people Walgreen demoted were not given the chance to choose the store to which they would be assigned as an assistant manager, but Walgreen allowed Rowe to select any store in the Houston area. Rowe chose to work at a store in Sugar Land, Texas, ten minutes from his home. He now complains that he was "forced" to work "far

from his home." Rowe's complaints are unfounded and inconsistent. None of these conditions has been converted to racial hostility.

C. *Intentional Infliction of Emotional Distress.*

To make a claim for intentional infliction of emotional distress, Rowe must show outrageous acts intolerable in a civilized society that caused severe emotional distress beyond mere disappointment, anger, or embarrassment. *Wornick Co. v. Casas,* 856 S.W.2d 732, 734 (Tex. 1993); *Automobile Ins. Co. of Hartford v. Davila,* 805 S.W.2d 897 (Tex. App.-Corpus Christi 1991), *overruled on other grounds,* 843 S.W.2d 464 (Tex. 1992). Rowe's complaint alleges no extreme conduct, and he has not suffered severe emotional distress.

Rowe complains that Frizzell would not give him a day off to take his mother to a doctor appointment on May 23, 1994. Frizzell told Rowe he should be at his store because it might be evaluated that day. Rowe requested the day off two days before. He never told Frizzell why he wanted that particular day off. Far from intentionally causing distress, Frizzell's denial of time off did not even approach insensitivity since Rowe did not indicate why he wanted the day off. After Rowe's mother had a stroke, Frizzell let Rowe take time off to care for her. Rowe's original complaint did not mention the incident.

D. *Frizzell.*

Rowe claims that Frizzell discriminated against him. Rowe has not shown that he was treated discriminatorily. Even if Rowe succeeded in his claims against Walgreen, he could not succeed against Frizzell. Frizzell acted in the course and scope of his employment with Walgreen. Frizzell was not Rowe's employer, and he was not even his supervisor except at the very end, after Rowe had received numerous bad performance evaluations.

4. *Conclusion.*

Walgreen did not discriminate against Rowe. He was demoted for legitimate non-discriminatory reasons after receiving numerous poor performance evaluations. Walgreen did not fire him; it demoted him with the intention of re-promoting him after additional training. Rowe

complains of intolerable work conditions, but he was treated better than others who were demoted because he was allowed to choose the store to which he was reassigned. Frizzell was not Rowe's employer and did not discriminate against him. Rowe will take nothing from Walgreen or Frizzell.

Signed July 5, 1996, at Houston, Texas.

/s/illegible
Lynn N. Hughes
United States District Judge

Supreme Court, U.S.
FILED
JUL 30 1997
CLERK

No. 97-12

In The

Supreme Court of the United States

October Term, 1996

EDDIE LEE ROWE, SR.,

Petitioner,

vs.

WALGREEN COMPANY AND TONY FRIZZELL,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Court of Appeals properly reviewed the competent evidence submitted by the parties when it affirmed the summary judgment granted by the District Court in favor of Respondents Walgreen Co. and Tony Frizzell on Petitioner Eddie Rowe's claims of race discrimination and intentional infliction of emotional distress?

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BRIEF IN OPPOSITION

Respondents file this Brief in Opposition and respectfully request that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Procedural History. This is an appeal from a summary judgment granted in favor of Respondents Walgreen Co. ("Walgreens") and Tony Frizzell ("Frizzell") (collectively "Respondents"). Petitioner Eddie Lee Rowe, Sr. ("Rowe") filed a state court lawsuit against Respondents alleging discrimination because of his race and age in violation of TEX. LAB. CODE ANN. § 21.051; 42 U.S.C. § 1981 and §§ 2000e *et seq.*; and 29 U.S.C. §§ 621 *et seq.* Rowe also alleged a state law claim of intentional infliction of emotional distress. Respondents timely removed the case to federal court based on federal question jurisdiction, and moved for summary judgment. The District Court granted Respondents' motion, holding that Rowe had failed to raise genuine issues of material fact regarding his *prima facie* cases of age and race discrimination, pretext and the outrageous conduct necessary to support his claim of intentional infliction of emotional distress. Additionally, the District Court denied Rowe's claim for individual liability against Frizzell for discrimination (Pet., App. C). Rowe appealed the judgment of the District Court to the Fifth Circuit, which affirmed in an unpublished opinion, incorporating the opinion of the

District Court into its own (Pet., App. A).[1] Rowe's petition for rehearing by the Fifth Circuit was denied without further comment (Pet., App. B).

Statement of Facts. Rowe began working for Walgreens as an Assistant Manager in 1978 (R.V. 3, 381). In 1981, Rowe was promoted to the position of store manager (R.V. 3, 392). Between 1981 and late-1993, Rowe was demoted from store manager two (2) times, and promoted back to store manager after additional training; Rowe never complained about these demotions (R.V. 3, 262-265, 267-274, 282). During his stints as store manager, Rowe was given performance reviews by several different Walgreens District Managers (R.V. 3, 267-274, 355-359). It is undisputed that throughout his entire career, Rowe never received an overall performance rating higher than "standard"; indeed, many of his performance ratings were barely within the "standard" range (R.V. 3, 267-274, 355-359). Again, Rowe never complained about these ratings (R.V. 3, 363-367).

In early-October 1993, Rowe was counselled by his District Manager, Donald Witt, and the Regional Vice-President, Richard McMillin, about numerous problems with his job performance, including his store's condition and improper control of merchandise (R.V. 3, 212-213, 267-274, 327-332). Witt and McMillin gave Rowe two (2)

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[1] Rowe did not appeal the District Court's summary judgment on his claim of age discrimination, and has not included that claim in his petition for writ of certiorari. Moreover, Rowe's petition for writ of certiorari does not seek review of the ruling that Frizzell is not individually liable for the alleged discrimination.

weeks to improve in these areas; otherwise, he would be terminated or demoted (R.V. 3, 212-213, 267-274, 330-331). However, before this two-week period ended, Witt was replaced as District Manager by Frizzell, formerly a District Manager for Walgreens in Miami, Florida (R.V. 3, 262-265, 267-274). Upon Frizzell's arrival, Rowe's two-week probationary period was "dropped" by Frizzell and McMillin, so that Rowe would have an opportunity to improve under Frizzell's supervision (R.V. 3, 262-265, 267-274).

After Frizzell arrived, he reviewed Rowe's performance and his store's operations several times (R.V. 3, 219-226, 262-265). In each review, Frizzell noted serious problems with the condition of Rowe's store, inventory management, and his performance managing employees (R.V. 3, 219-226, 349). Because of Rowe's lack of sustained improvement in the noted problem areas, he received a rating of "below standard" from Frizzell in February 1994 (R.V. 3, 219-226, 262-265). Frizzell reevaluated Rowe and his store three weeks later, and determined that Rowe had failed to improve his performance (R.V. 3, 217, 262-265). At this time, Rowe was given thirty (30) days to improve his performance to the level expected of Walgreens store managers, or face removal from the position of store manager (R.V. 3, 262-265, 267-274, 322-323).

During the 30-day probationary period, Rowe did not make the required improvements in his performance or in the condition of his store; indeed, additional problems became apparent during the 30-day period, including failure to adhere to Walgreens' audit control policies, failure to direct his subordinates to remove outdated merchandise and realign items on the store shelves, and

failure to direct his subordinates to perform basic daily tasks, such as maintaining the store in good condition and properly maintaining stockroom inventory (R.V. 3, 264, 267-274). Because of his failure to cure his performance deficiencies, Rowe was demoted to assistant manager and reassigned for additional training on June 6, 1994 (R.V. 3, 262-265, 267-274). The purpose of the additional training was to assist Rowe in returning to a position as store manager; both Frizzell and McMillin believed that Rowe could be re-promoted after completing additional training (R.V. 3, 267-274).

Although demoted store managers ordinarily were not permitted to select their new store assignments, Rowe was allowed to choose the Houston-area Walgreens location in which to work as an assistant manager (R.V. 3, 267-274, 316-317, 347-348). Rowe chose to work at a store in Sugar Land, Texas, only ten (10) minutes from his home (R.V. 3, 316-317). When he chose this location, he knew the store was open 24 hours each day (R.V. 3, 316-317). Prior to taking his new assignment, Rowe took a combined three (3) months of vacation, and a subsequent leave of absence (R.V. 3, 267-274, 319). Although demoted, Rowe's salary was higher than that for the executive assistants, and higher than that received by other assistant managers in Frizzell's district (R.V. 3, 267-274).

On November 5, 1994, Rowe voluntarily resigned his position as assistant manager after working only a few weeks in that position (R.V. 3, 267-274, 383). At the time of his resignation, Rowe's District Manager was Dennis Schmitt, not Frizzell (R.V. 3, 314-315). Although Rowe claims he resigned because he would not be a store

manager again, he told Bob Petty, his store manager, that he was resigning because of personal and financial problems, and that he did not want to work on Sundays (R.V. 3, 205-208, 210, 313). In his conversation with Petty, Rowe did not mention race or age discrimination, or his demotion (R.V. 3, 205-208, 210).

In May 1994, Rowe's mother moved to Houston. In connection with his mother's move, Rowe asked Frizzell if he could have the Monday after Mother's Day off (R.V. 3, 288). Rowe did not tell Frizzell that the reason he wanted the day off was to take his mother to the doctor (R.V. 3, 283). Believing that he and McMillin might appear at Rowe's store on that same day, Frizzell refused Rowe's request (R.V. 2, 750). Tragically, Rowe's mother suffered a stroke on that day, and she later died from complications from the stroke (R.V. 3, 289). Frizzell allowed Rowe time off to handle the affairs in connection with his mother's illness and funeral (R.V. 3, 284-285).

Correction of Misstatements in the Petition. In his petition for writ of certiorari, Rowe makes several misstatements of fact, mischaracterizes several facts, and omits several important facts, all of which should be brought to the Court's attention. Some of the misstatements, mischaracterizations, and omissions are the following:[2]

1. Rowe states that "he was reassignment [sic] for training" in September 1982, after being

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[2] This list is not complete; several of the omissions and misstatements of fact by Rowe go directly to the grounds he has alleged for review of this case, and have been addressed in the appropriate sections, *infra*, in Respondents' statements of the reasons for denying the writ of certiorari.

a store manager since November 1981 (Pet., p. 1). This action by Walgreens was a *demotion*, not a "reassignment."

2. Rowe fails to state that he was again *demoted* in July 1986, instead claiming that he held the position of "executive assistant" merely because "another store was being readied for him" (Pet., p. 2).

3. Rowe's store was *not* rated "above standard" in August 1993 (Pet., p. 2). The "above standard" rating was on an audit review for cash handling procedures *only*. The evidence is undisputed that Rowe *never* received an overall rating higher than "standard."

4. Rowe downplays the seriousness of the store conditions noted by Witt and McMillin in October 1993 by stating "[w]hile they were very complementary [sic], they found certain items that needed attention" (Pet., p. 2). The evidence shows that the problems were serious enough that Rowe was given two (2) weeks to correct them, or face demotion or termination.

5. Rowe falsely asserts that he "remedied each specific problem and nothing else was ever said about it" (Pet., p. 2). Rowe submitted *no evidence* in support of this self-serving statement. Moreover, the competent evidence submitted by Respondents is replete with references to continuing problems in Rowe's store after October 1993 until his demotion in June 1994, including wholly unchallenged testimony by Rowe's

replacement about the horrendous condition of Rowe's store when she replaced him.

6. Rowe admitted in his deposition that he *did not* tell Frizzell he needed the Monday after Mother's Day off to "take his sick mother to the doctor" (*See* Pet., p. 4).

7. McMillin never testified that "generally the first time a manager receives a 'below standard' rating in their evaluation, the manager is transferred to a lower volume store" (Pet., p. 4). When specifically asked that question, McMillin answered "I don't recall" (R.V. 2, 705-04).

8. The Court may properly ignore evidence relating to "Doug Berry" (Pet., p. 5). Rowe failed to submit any evidence about Mr. Berry to the District Court. Therefore, the Court of Appeals was entitled to ignore this evidence on appeal. *Guillory v. Domtar Industries, Inc.*, 95 F.3d 1320, 1327 (5th Cir. 1996).

9. Neither the District Court nor the Court of Appeals held that Rowe had proved a *prima facie* case of discrimination (Pet., p. 6). The District Court expressly stated that "[b]ecause he had received negative evaluations three times between October 1993 and March 1994, however, [Rowe] was not qualified for the position of store manager" (Pet., App. C, p. 8a). The Court of Appeals' only statement about Rowe's *prima facie* case is "[t]o the extent that Rowe makes a prima facie case . . . it is soundly rebutted." (Pet., App. A, p. 2a). The Court of Appeals

then adopts by reference the opinion of the District Court (*Id.*, p. 3a).

10. Rowe asserts that "Walgreen presented irrelevant evidence of white employees who were not under Frizzell's supervision" (Pet., p. 8). Rowe failed to object to the evidence to which he refers; therefore, he has waived any relevancy objection.

11. Rowe asserts he "presented evidence" about "additional parking space" requested by him, and refused by Frizzell (Pet., p. 8). Rowe fails to state that he attempted to present this evidence to the Court of Appeals, but not to the District Court. Respondents objected to consideration of this evidence by the Court of Appeals. *See Guillory, supra.*

12. Rowe asserts that his store "was in the top 25% in profit performance for his district." (Pet., p. 2). This assertion is not supported by the evidence. The evidence cited by Rowe is testimony that his store was in the top quarter, "more or less," in "total sales" in the district (R.V. 2, 690). "Total sales" does not equate to "profits." Rowe presented no evidence about the profit performance of his store during the time period he was being counseled for his performance problems. To the contrary, Walgreens presented undisputed evidence that the profits of Rowe's store were *decreasing* as a result of the issues about which he was being counseled (R.V. 3, 219-26, 350-51).

REASONS FOR DENYING THE WRIT

After failing to "pull the wool over the eyes" of the District Court and the Court of Appeals, Rowe now attempts to essentially convince this Court to *review the evidence* in this case, and reverse the summary judgment granted against him. However, Rowe fails to present a colorable basis for review, relying on a statement of "Questions Presented" with no relation whatsoever to the evidence submitted or rulings in the case, false or misleading references to the evidence in the record, omission of highly probative evidence in support of the judgment, and allegations and arguments wholly unsupported by any competent evidence.

In support of his petition, Rowe presents for consideration by this Court four (4) questions relating to the proper standards of evidentiary review on motions for summary judgment. However, closer examination of the record and opinions in the lower courts shows that Rowe's four questions are overblown and unnecessary. Specifically, the Fifth Circuit's comment that Rowe's argument "defies logic," (*see* Pet., App. A, p. 2a) clearly is just that, a comment; it is neither a "presumption" nor a "holding" as Rowe states in his first question. The Court may properly ignore this question because it is unwarranted by the record.

Rowe's remaining three questions relating to the consideration of evidence, the evaluation of evidence, and the inferences to be drawn from such evidence, are merely redundant subsets of the only real question presented for this Court's consideration. That question, as framed by Respondents, is "Whether the District Court

and Court of Appeals properly reviewed the summary judgment evidence presented by the parties?"

Thus, Rowe presents no novel question of law to be answered by this Court, and he does not argue that existing law is incorrect or should be modified. Instead, Rowe merely asks this Court to again evaluate the evidence, a task already properly completed by the lower courts and reverse their judgment.

A proper evaluation of the law and the evidence reveals that the Fifth Circuit's judgment was correct. Rowe's petition for writ of certiorari should be denied.

ARGUMENT

I. The Court of Appeals and the District Court used the Proper Summary Judgment Standard When They Evaluated the Summary Judgment Evidence Presented by the Parties.

The answer to the question presented, as framed by the Respondents, depends on a review of the summaries of the evidence presented by the parties. The summary of the evidence presented by Rowe in his petition is erroneous in several respects, and will be addressed in more detail later in this brief. First, however, it is necessary to show that the District Court and the Fifth Circuit used the proper legal standards for evaluating the evidence.

A. The Proper Summary Judgment Standard

A proper review of Rowe's petition first requires an accurate statement of the standards for granting summary judgment, as dictated by this Court. Through misleading citation of selected opinions by this Court, Rowe has attempted to "cloud the waters" so emphatically made clear by the Court in its seminal case discussing summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The teaching of *Anderson* that Rowe most blatantly ignores in his petition is that he must show more than *some* factual dispute in order to defeat summary judgment; instead, he must show that the alleged factual dispute is not only "material," but also "genuine." *Id.*, at 248-49. A factual dispute is "material" when it "might affect the outcome of the suit under the governing law." *Id.* at 248. A factual dispute is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* If the evidence presented by the nonmoving party is merely "colorable," or is not sufficiently probative, summary judgment may be granted. *Id.*, at 249-50. Moreover, the nonmoving party must present evidence, not merely allegations, arguments, and denials. *Id.* at 248-49. In short, the question on summary judgment is "whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact *because they may reasonably be resolved in favor of either party.*" *Id.* at 250 (emphasis added).

Rowe also fails to state in his petition additional standards for the review of summary judgment evidence when a court is asked to determine whether a genuine

issue of material fact exists. Specifically, Rowe fails to recognize that presenting general allegations and arguments in response to specific facts is insufficient to raise a genuine issue of material fact. *Lujan v. Nat. Wildlife Federation*, 497 U.S. 871, 888 (1990). Further, the evidence presented in the nonmovants' response must be in admissible form, and cannot consist of mere speculation, hearsay, conclusions, or subjective beliefs. *See, e.g., Mitchell v. Toledo Hospital*, 964 F.2d 577, 584-85 (6th Cir. 1992); *Lechuga v. Southern Pacific Transp. Co.*, 949 F.2d 790, 798 (5th Cir. 1992). Moreover, the inferences to be drawn from the evidence presented must be rational, reasonable and justifiable; inferences which are "idle, speculative, or conjectural" will not defeat a properly supported summary judgment motion. *Unida v. Levi Strauss & Co.*, 986 F.2d 970 (5th Cir. 1993). Finally, the determination of whether summary judgment is proper can be made only after a review of *all* evidence properly submitted; no proper evidence is to be ignored, and allegations unsupported by proper evidence should not be considered. *Armstrong v. City of Dallas*, 997 F.2d 62, 66 (5th Cir. 1993).

Not surprisingly, it is Rowe's failure to recognize these additional standards for review of summary judgment evidence which render his petition groundless. More specifically, as detailed below, Rowe failed to submit competent evidence specifically contradicting Walgreens' evidence about his severe performance problems. In addition, the inferences he asks this Court to draw are unreasonable and not supported by the competent evidence. After a thorough *de novo* review of the evidence presented by the parties to the District Court, the Fifth Circuit properly held that Rowe had failed to present

issues of fact that were both "material" and "genuine." *See* Opinion of Fifth Circuit, Pet., App. A, p. 2a. The cited language in the Fifth Circuit's opinion reveals that it considered some factual disputes "material" but not "genuine," and some disputes "genuine" but not "material." In this situation, the Fifth Circuit's affirmance of the District Court judgment was proper. *Anderson, supra,* at 248-49.

B. The District Court and the Fifth Circuit Reviewed the Evidence Using the Proper Substantive Law.

Another teaching of *Anderson* is that the determination of materiality is made by reviewing the substantive law to determine which facts are essential to the issues in dispute. *Anderson,* at 248. In this case, the District Court relied on the proper substantive law in identifying which facts were material to the issues before it. Specifically, the District Court enunciated the proper *prima facie* case for Rowe's claims of discrimination and intentional infliction of emotional distress. *See* Opinion of the District Court, Pet., App. C, pp. 7a-8a, 10a. It is also apparent that the District Court understood the proper standard for pretext in discrimination cases. *Id.*, pp. 8a-9a. Moreover, it is clear from the Fifth Circuit's opinion that it also reviewed the evidence using the proper substantive law. *See* Pet., App. A.

II. The District Court and the Court of Appeals Properly Reviewed and Analyzed the Competent Summary Judgment Evidence Presented by the Parties.

As demonstrated above, the District Court and the Fifth Circuit evaluated the summary judgment evidence presented by the parties using the proper legal standards. An accurate review of the summary judgment evidence presented to the lower courts shows that the summary judgment in favor of Respondents was proper, and, therefore, Rowe's petition should be denied.

A. Rowe Failed to Prove a *Prima Facie* Case of Discrimination, and His Evidence of Pretext Failed to Raise a Genuine Issue of Material Fact.

Walgreens moved for summary judgment on the basis that Rowe could not prove his *prima facie* case of race or age discrimination because the evidence showed he was not qualified to remain as a Walgreens store manager when he was demoted to assistant manager. In support of this claim, Walgreens presented evidence which identified the criteria used for evaluating the performance of store managers, and extensive evidence showing that Rowe had failed miserably to maintain the performance level expected of store managers for a period of nearly nine (9) months prior to his demotion (R.V. 3, 212-213, 219-226, 262-265, 267-274, 330-331, 355-359).

More specifically, the evidence presented by Walgreens showed that beginning at least as early as October 1993, Rowe had significant problems in his store with

cleanliness, inventory management, personnel management, and sales and profit performance (R.V. 3, 267-274, 330-333). The evidence presented by Walgreens shows that these problems continued to exist, in varying levels, during subsequent visits by management in November and December 1993, and February, March, and April 1994 (R.V. 3, 219-226, 267-274, 327-333, 349). Walgreens also submitted the testimony of Pamela Kelly, the Walgreens manager who replaced Rowe when he was demoted; Ms. Kelly's properly submitted and unchallenged affidavit details the significant problems which existed at Rowe's store when she arrived (R.V. 3, 240-242).

Rowe's attempts to respond to the overwhelming evidence of his poor performance, and consequently to raise a fact issue about "pretext" were, in the words of the Fifth Circuit, "feckless." Rowe does not dispute that several problems existed in October 1993; instead he merely attempts, without competent evidentiary support, to downplay their seriousness.[3] Even more telling, however, is that *nowhere does Rowe deny that the continuing problems described in detail in Walgreens' evidence actually existed!* Instead, Rowe cynically attempts to minimize their importance by engaging in a game of "Mathematician," pointing out that only a limited number of statements on the supervision reports addressed the problems

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[3] Walgreens objected to Rowe's self-serving, unsupported, and speculative "evidence" that he "remedied each specific problem [identified during the October visit] and nothing else was ever said about it." (Pet., p. 2). Indeed, the allegation that "nothing else was said" ignores the evidence of the problems identified on the other supervision visits about which Walgreens submitted competent evidence.

of cleanliness and "outs."[4] This superficial analysis fails to address the real issue, amply supported by Walgreens evidence, that store cleanliness and inventory problems remained a significant problem for Rowe until his demotion in June 1994. Moreover, Rowe completely failed to address the evidence detailing his problems with managing his employees, and with internal controls.[5] Finally, Rowe submitted *no evidence* disputing any of the statements by Pamela Kelly detailing the condition of Rowe's former store when she took over its management.

Rowe also attempts to prove he was qualified to be a Walgreens store manager by continually relying on the fact that he had maintained a "standard" rating for many years before Frizzell became his District Manager. Rowe relies on *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181-82 (5th Cir. 1996), as support for his assertion that the fact of prior positive evaluations is evidence that subsequent negative evaluations may be pretextual. Rowe's reliance on *Time Warner* is misplaced. *Time Warner* involved a failure to promote, and the court relied on evidence that, *both before and after* the promotion the

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[4] Rowe's assertion that Frizzell "admitted . . . that the supervision notes . . . did not bear out the claim that there were too many 'outs' " is predicated solely on this mathematical analysis. Frizzell stated merely that "that percentage" does not support the claim (R.V. 2, 621-24). However, Frizzell *never* admitted that the outs were not a problem, and Rowe *never* denied they were a problem.

[5] In responding to the evidence about problems with cash controls, Rowe refers to an audit completed in August 1993 which rated his store "above standard." However, he submits no evidence to dispute Walgreens evidence that audit control problems existed in 1994.

plaintiff claimed he was discriminatorily denied, the plaintiff received positive evaluations on the performance element the company relied on to deny the promotion. *Id.*, at 181-82. In contrast, Rowe exhibited performance problems for nearly nine (9) months prior to his demotion, and no evidence exists that his performance was acceptable after his demotion.

Rowe also attempts to prove he was qualified by relying on his own self-evaluation as proof that his performance was "standard." Rowe's subjective belief about his qualifications, and the performance rating he believes he was entitled to, is insufficient to raise a genuine issue of material fact. *See EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1448 (5th Cir. 1995); *Mitchell v. Toledo Hospital*, 964 F.2d 577, 584-85 (6th Cir. 1992); *Little v. Republic Ref. Co.*, 924 F.2d 93, 96 (5th Cir. 1991).

In sum, there is a substantial amount of undisputed evidence about Rowe's performance problems, and Rowe failed to aver specific facts which contradicted the specific facts presented in proper form by Walgreens. *Lujan v. Nat. Wildlife Federation*, 497 U.S. 871, 888 (1990).

B. Rowe's Arguments About Alleged Different Treatment of White Employees is not Supported by the Summary Judgment Evidence.

Rowe also asserts that he raised a genuine issue of material fact about race discrimination because he proved that white managers were treated better than he was. This argument is not supported by the competent summary judgment evidence submitted by the parties.

Rowe presented evidence that Walgreens store managers Goodson and Hogan were transferred to smaller stores instead of being demoted after they received "below standard" performance ratings;[6] this is true. However, by way of explanation, Walgreens submitted competent evidence that, after receiving these evaluations, Goodson and Hogan each *improved their performance* to the minimum level expected of store managers, and that it was because of this improvement that they were transferred instead of demoted (R.V. 3, 193-195, 267-274).[7] Walgreens also submitted evidence that Rowe was demoted because he *did not* improve his performance to the minimum level after receiving his "below standard" evaluation (R.V. 3, 262-265, 267-274). Moreover, Walgreens submitted extensive evidence identifying several white managers who were demoted after having received overall performance evaluations *higher* than Rowe (R.V. 3, 193-195, 267-274). All of this evidence was completely undisputed by Rowe.[8] The competent summary judgment

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[6] Rowe also identifies Doug Berry as a white manager who was treated more favorably, and alleges a white manager received additional parking space at the store previously managed by Rowe. However, Walgreens objected to these arguments in the Fifth Circuit because Rowe failed to raise them in the District Court. *Guillory, supra,* at 1327.

[7] Walgreens also presented evidence that Goodson's performance subsequently deteriorated again, and that he was terminated as a result (*Id.*).

[8] Rowe now refers to the evidence about the demoted white managers as "irrelevant" (Pet., p. 8). Rowe failed to object to this evidence in the District Court, and has never before claimed the evidence is irrelevant. His objection is untimely.

evidence does not support the claim that white managers were treated better than Rowe.

C. Rowe Failed to Raise a Genuine Issue of Material Fact on His Claim of Intentional Infliction of Emotional Distress.

In his petition, Rowe properly states the legal standard in Texas for maintaining a claim of intentional infliction of emotional distress. *See* Pet., p. 9. Whether a plaintiff has alleged conduct sufficiently "extreme and outrageous" to support a claim of intentional infliction of emotional distress is, in the first instance, a question of law for the court. *Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993). In support of Rowe's argument about this claim, Rowe asserts that the Fifth Circuit erred in failing to consider his emphatic statement that he informed Frizzell that he needed a day off to take his mother to the doctor. Again, Rowe only tells half the story.

In his deposition, Rowe was asked if he had told Frizzell "that it was an emergency and that [he] had to go to the doctor that day?" Rowe responded, "No." (R.V. 2, 755). Later, Rowe was asked, "Did you tell him, no, I can't work on Monday because my mother is sick and she's in town and she's got to go to the doctor? Did you tell him specifically that it was impossible for you to be at work on Monday because of her doctor's appointment?" Again, Rowe responded, "No." (R.V. 2, 750). It was only after Walgreens had presented its properly supported summary judgment motion that Rowe asserted in an affidavit that he did tell Frizzell that he needed to take his mother to the doctor. In addition, Rowe attempted to

argue, for the first time on appeal, that the second question noted above was compound, and, therefore, objectionable. The Fifth Circuit was entitled to ignore Rowe's untimely objection to the form of the question. *See Daigle v. Maine Medical Center, Inc.*, 14 F.3d 684, 692 n.11 (1st Cir. 1994); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 921 (8th Cir. 1986); *Kirschner v. Broadhead*, 671 F.2d 1034, 1037-38 (7th Cir. 1982); FED. R. CIV. P. 32(d)(3)(B). In addition, the Fifth Circuit was entitled to ignore Rowe's attempt to contradict in his subsequent affidavit, without explanation, his prior sworn deposition testimony. *S.W.S. Erectors v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir. 1996). The Fifth Circuit properly affirmed the District Court's ruling that Rowe failed to raise a genuine issue of material fact on his claim of intentional infliction of emotional distress.

III. Conclusion and Prayer

Rowe's petition is replete with allegations that the Fifth Circuit improperly regarded Walgreens' evidence as "true," presumed that Walgreens would not discriminate, drew inferences in favor of Walgreens, and ignored Rowe's evidence. A proper review of the entirety of the evidence reveals that Rowe is sorely mistaken.

Rowe apparently believes that all of his statements, arguments and inferences, regardless of whether they are properly supported by evidence, must be regarded as true, and that no "facts or inferences" may be credited in favor of Walgreens. This argument ignores the fact that objections to evidence may be made and sustained, thus resulting in a proper "disregard" of certain evidence, arguments, and inferences. Indeed, Walgreens objected to several portions of

Rowe's arguments and evidence as unsupported, speculative, misleading, self-serving, and contradictory, among others. Rowe's argument also ignores that fact that much of Walgreens' evidence about Rowe's performance problems remained *completely undisputed* by Rowe, and that inferences may properly be drawn, *in favor of Walgreens*, from that undisputed evidence.

After reviewing the totality of the competent evidence presented by the parties, as required by existing authority, the Fifth Circuit properly concluded that Rowe's evidence, and the reasonable and justifiable inferences therefrom, did not raise genuine issues of material fact about the reasons for Rowe's demotion. Moreover, the Fifth Circuit did not give Walgreens the benefit of disputed facts, presume its truthfulness, or improperly allow inferences in Walgreens favor based on the identity of the parties. Rather, the Fifth Circuit properly based its judgment on competent, and largely uncontroverted, evidence regarding Rowe's sustained performance problems.

Because the evidence fails to raise a genuine issue of material fact, Rowe's petition for writ of certiorari should be denied.

Respectfully submitted,

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